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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California
corporation,

Plaintiff,

v.

GIGANEWS, INC., a Texas corporation;
LIVEWIRE SERVICES, INC., a Nevada
corporation; and DOES 1 through 100,
inclusive,

Defendants.

GIGANEWS, INC., a Texas corporation;
LIVEWIRE SERVICES, INC., a Nevada
corporation; and DOES 1 through 100,
inclusive,

Counter-claimants,

v.

PERFECT 10, INC., a California
corporation,

Counter-defendant.

Case No.: 2:11-cv-07098-AB-SH(x)
Before Honorable André Birotte, Jr.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT
ON INADEQUACY OF PERFECT
10, INC.'S NOTICES UNDER THE
SECTION 512 SAFE HARBOR**

Date: November 17, 2014

Time: 10:00 a.m.

Place: 790 (Roybal)

Discovery Cut-Off: June 30, 2014

Pretrial Conference: January 19, 2015

Trial Date: January 27, 2015

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants Giganews, Inc. (“Giganews”) and Livewire Services, Inc. (“Livewire”) (collectively, “Defendants”) have filed a Motion for Partial Summary Judgment (the “Motion”) regarding the alleged inadequacy of the notices sent to them by Plaintiff Perfect 10, Inc. (“Perfect 10”) under the Digital Millennium Copyright Act (the “DMCA”) that is fatally flawed. This Court should deny the Motion for several separate and independent reasons.

First, although Defendants seek to obtain a ruling that all of Perfect 10’s notices fail to satisfy the requirements of Section 512(c) of the DMCA,¹ Defendants have failed to submit to this Court 37 of Perfect 10’s notices that are at issue in the case. In particular, Defendants improperly classify Perfect 10’s notices into five groups (Groups A through E) which are simply not representative of Perfect 10’s notices. Defendants further fail to address key Perfect 10 notices including notices where Message-IDs are not available to the copyright holder, which is a common occurrence.

Second, Defendants are not entitled to any relief because at least 139 of the notices upon which Defendants seek to rely have been substantially altered, either because portions of the notice have been cropped off or because the notice has been reduced and degraded so as to make it almost impossible to read. Because Defendants fail to submit or address the DMCA notices actually submitted to them by Perfect 10, their Motion fails.

Even if Defendants overcome these obstacles (and they should not be able to do so), Defendants still are not entitled to any relief. In order for a notice to comply with Section 512(c)(3)(A) of the DMCA, it must satisfy six requirements. Defendants do not dispute that Perfect 10’s notices satisfy five of these requirements. Rather, the

¹ Defendants’ [Proposed] Order asks this Court to enter partial summary judgment that “all of Perfect 10’s notices, *other than* the notices in which Perfect 10 transmitted Message-IDs in machine-readable formats” are inadequate under Section 512(c) of the DMCA. See Proposed Order (Docket No. 534-38) at 1 (emphasis in original).

1 Motion only challenges whether Perfect 10's notices provide "[i]dentification of the
 2 material that is claimed to be infringing ... and information reasonably sufficient to
 3 **permit** the service provider to *locate* the [allegedly infringing] material." 17 U.S.C.
 4 § 512(c)(3)(A)(iii) (emphasis added). Defendants assert that a notice does not comply
 5 with this requirement unless it includes "machine-readable"² Message IDs for each
 6 infringing work. As the Court likely is aware by now, a Message-ID is a character
 7 string such as Ot-dnen7MO3tpivUnZ2dnUVZ8teWn Z2d@giganews.com.

8 Defendants simply are wrong. Their Motion is based entirely on the false
 9 premise that, unless Perfect 10 strictly complies with Defendants' Message-ID
 10 requirement, its notices are deficient. Neither the DMCA nor case law so demands.
 11 On the contrary, it is well settled that Section 512(c)(3) does not require any particular
 12 format for DMCA notices. Requiring a Message-ID may be convenient for
 13 Defendants, but it is not statutorily compelled. Rather, Perfect 10 need only show that
 14 its notices satisfy the language of Section 512(c)(3)(A)(iii).

15 As explained in Section V below, Perfect 10's notices, including the sample
 16 notices discussed in the Motion, comply with Section 512(c)(3)(A)(iii). These notices
 17 identify the material that is claimed to be infringing and provide information
 18 reasonably sufficient to permit Defendants to locate the allegedly infringing material.
 19 In fact, because Defendants have processed at least 12 of Perfect 10's notices, and
 20 other Usenet operators have also processed Perfect 10's notices, Defendants cannot
 21 assert that such notices are deficient.

22 Defendants nevertheless assert that Perfect 10's notices were "burdensome" to
 23 process. This claim fails, for two separate reasons. First, the language of "burden" is
 24 nowhere found in Section 512(c)(3) of the DMCA. *Perfect 10, Inc. v. CCBill, LLC*,
 25 488 F.3d 1102 (9th Cir.), *cert. denied*, 552 U.S. 1062 (2007) ("*CCBill*"), upon which

26 ² Nowhere in their moving papers do Defendants explain what "machine readable"
 27 Message-IDs are. Moreover, Giganews's website states only that DMCA notices
 28 must include Message-IDs. Zada Decl. ¶ 15, Exh. 6.

1 Defendants mistakenly rely, is not to the contrary. *CCBill* does not change the
 2 language of Section 512(c)(3)(A)(iii); it simply restates the statutory requirement that
 3 it is the “burden” of the copyright holder to provide information reasonably sufficient
 4 to permit the service provider to locate allegedly infringing content.

5 Furthermore, contrary to Defendants’ claim, Perfect 10’s notices are not
 6 burdensome to process. Rather, as shown below, Perfect 10’s notices could have been
 7 processed at least *2,000 times faster* than the average time Google spends processing
 8 notices it receives via its electronic web form. In fact, Perfect 10’s notices which
 9 provide a search term, such as “perfecttengallery,” can be processed at a rate **533,250**
 10 **times faster** than the typical web form notice processed by Google. Therefore, there
 11 is no basis for this Court to conclude that such notices are “burdensome.”

12 Finally, Defendants’ contention that notices must include lists of Message-IDs
 13 in order to comply with the DMCA also fails, for multiple reasons. First, because
 14 Message-IDs are incomprehensible, they fail to comply with Section 512(c)(3)(A)(iii)
 15 because they do not identify the allegedly infringing material to a lay person (such as
 16 a juror). Second, Defendants cannot be allowed to require Message-IDs in DMCA
 17 notices, when such Message-IDs frequently do not exist. Third, Message-IDs are
 18 extraordinarily prone to both human and computer error. Approximately 44.7% of all
 19 Message-IDs produced by Defendants in discovery (1,150,000 Message-IDs), had one
 20 or more errors, making them unusable. Fourth, Defendants cannot be allowed to
 21 require Message-IDs, when they fail to explain how to locate Message-IDs, let alone
 22 expeditiously. For this reason, Defendants should be barred under the principle of
 23 equitable estoppel from insisting on Message-IDs.³

24 Giganews has *25,000 terabytes* of copyrighted works on its servers, which it
 25 copies, distributes, and sells to Livewire and its users without permission from *any*

26 ³ Judge Collins’ January 29, 2104 Order (Dkt No. 180), upon which Defendants
 27 heavily rely, is not to the contrary. New evidence submitted by Perfect 10 to this
 28 Court, which was not before Judge Collins, demonstrates that it is not burdensome for
 Defendants to process Perfect 10’s notices.

copyright holders. Defendants have failed to produce even ONE example of an authorized copyrighted work on the Giganews's Usenet servers. Giganews has yet to distinguish its operation from those of usenet.com, hotfile.com, news-service.com, guba.com, binnews.com, or megaupload.com, the operators of which were found liable for copyright infringement and/or are facing 25 years in jail for criminal copyright infringement. Defendants are now attempting to avoid liability for their conduct by asking this Court to accept their own self-created requirements for DMCA notices, even though such requirements are contrary to the statute and case law. This Court should reject Defendants' baseless contentions and deny the Motion.

II. RELEVANT FACTUAL BACKGROUND

A. Giganews's Business

Giganews owns and operates giganews.com – a site which offers 25,000 *trillion* bytes of content to its users. Declaration of Dr. Norman Zada, submitted herewith (“Zada Decl.”) ¶ 6, Exh. 2, p. 6. In exchange for paying a monthly fee, a user receives a Giganews username and password. The user must also purchase a subscription to use a newsreader, such as the newsreader created by Giganews called “Mimo” or a third-party newsreader such as “Newsrover.” Zada Decl. ¶¶ 6, 9, Exh. 2, p. 5. The newsreader allows the user to search through and download the content offered by Giganews.

B. Livewire's Business

Livewire contracts with Giganews to provide Livewire users with content that is stored on Giganews's Usenet servers. Livewire owns and operates various sites selling such access, including usenet.net. Zada Decl. ¶ 7, Exh. 3. Giganews and Livewire have the same DMCA agent, Ronald Yokubaitis, the Co-CEO of Giganews. Zada Decl. ¶ 7.

C. Giganews's DMCA Notice Requirements

Giganews's published DMCA instructions require a list of Message-IDs. A Message-ID is an undecipherable character string such as Ot-dnen7MO3tpivUnZ2dn

UVZ8teWnZ2d@giganews.com. Giganews claims it needs Message-IDs to remove infringing messages. Zada Decl. ¶¶ 11-13, Exhs. 1, 4. Giganews also accepts a list of Message headers as a valid DMCA notice. Zada Decl. ¶ 15, Exh. 6, p. 5. A Message header contains one or more Message-IDs, along with other information regarding the infringing message. On its website, Giganews does not explain how to find Message IDs or Message headers, let alone expeditiously. Giganews's DMCA agent, Ronald Yokubaitis, testified during deposition that he did not know how to find Message-IDs. Declaration of Lynell D. Davis, submitted herewith ("Davis Decl.") Exh. 3 [Deposition Transcript of Ronald Yokubaitis ("R. Yokubaitis Depo.")] 91:12-24, 94:9-13, 194:22-195:9. Giganews will only accept by email DMCA notices that are six megabytes or less. This limit is substantially lower than the limit of other service providers. Zada Decl. ¶ 6. Giganews requires that the copyright holder state under penalty of perjury that the notice is accurate, which is not a requirement of the DMCA. Zada Decl. ¶ 15, Exh. 6; *see generally* 17 U.S.C. § 512(c)(3).

D. The Mimo Automatic Message-ID Extraction Feature

Between March 25, 2009 and May 11, 2014, Perfect 10 spent months creating and sending to Giganews hundreds of DMCA notices. Zada Decl. ¶ 2. Defendants refused to process most of the notices because they contended that it was too burdensome for them to manually extract the Message-ID corresponding to each identified infringing message. Davis Decl., ¶ 4, Exh. 3 (R. Yokubaitis Depo.) at 41:10-43:9, 50:16-51:4. On May 21, 2014, however, after Perfect 10 had sent to Defendants the last of its more than 335 DMCA notices, Perfect 10 independently discovered that the Mimo newsreader has an Automatic Message-ID extraction feature that would have allowed Defendants to highlight a group of messages and extract all of the associated Message-IDs into a separate text file in seconds. Zada Decl. ¶¶ 23-24, Exh. 1, Video Demonstrations Folder, Video 4. Perfect 10 also independently discovered on or about that same day that three other popular newsreaders – Newsrover, Newsbin, and Newsleecher – have similar features that allow a user to

1 automatically extract Message-IDs. Zada Decl. ¶¶ 23-24, Exh. 1, Video
2 Demonstrations Folder, Videos 2, 3.

3 **E. Downloading Perfect 10 Content Offered By Defendants**

4 Perfect 10 has included a short video demonstration, Video 1 (Zada Decl.
5 (disk), in a folder “Video Demonstrations”), which shows how content may be
6 downloaded using a membership to Defendants’ websites. A search is performed on
7 “Karolina Runosson,” the name of a Perfect 10 model, using the Giganews Mimo
8 newsreader. Messages appear, along with the date the message was posted, the name
9 of the poster, and other related information, all of which will be referred to as the
10 “Message-Description.” Full-size Perfect 10 images are downloaded, each with an
11 identifying file name (also referred to as an “Image Identifier”), such as “Karolina
12 Runosson02.jpg.” The Image Identifier normally can be searched on to find
13 associated messages containing that same infringing Perfect 10 image. Zada Decl. ¶¶
14 11-13, Exhs. 1, 4. This video demonstrates why Message-Descriptions, which are
15 comprehensible and can be searched on, are more usable than Message-IDs, which are
16 incomprehensible and cannot be searched on.

17 **III. DEFENDANTS HAVE FAILED TO SUBMIT OR ADDRESS ALL OF**
18 **PERFECT 10’S NOTICES AT ISSUE IN THE CASE**

19 Defendants’ Motion misleadingly asks this Court to rule that all of Perfect 10’s
20 DMCA notices are deficient, even though all of these notices are not before the Court.
21 Rather, Defendants have not even submitted 37 of the notices sent to them by Perfect
22 10. Zada Decl. ¶ 25. Defendants have failed to address a number of key Perfect 10
23 notices, including Sample Notices submitted by Perfect 10 in connection with Perfect
24 10’s Motion for Partial Summary Judgment on the sufficiency of its notices (Dkt. No.
25 449), which cannot be properly placed in any of the five groups of notices Defendants
26 discuss.

27 Two of Perfect 10’s Sample Notices, neither of which were before Judge
28 Collins when she issued her January 29, 2014 Order, demonstrate this point. Sample

1 Notice 1 recommended that Defendants perform a search on “perfecttengallery” and
2 remove all resulting messages. *See* Dkt No. 449-12. Representative samples of both
3 the allegedly infringing images and the allegedly infringing messages were provided,
4 sufficient to satisfy the first prong of Section 512(c)(3)(A)(iii). A representative
5 sample of infringed images was also provided. Defendants could have used Sample
6 Notice 1 to remove 4,951 infringing messages (which were all contained in a single
7 .zip file) in approximately 20 seconds. *See* Zada Decl. ¶ 24, Exh. 1 (the disk) Video
8 5. This translates to approximately 247 images per second. By contrast, Google
9 claims that it processes DMCA notices submitted via its electronic form at the rate of
10 approximately *one image blocked every thirty six minutes* (one image blocked per
11 2,160 seconds). Zada Decl. ¶ 45, Exh. 28. Thus, using a notice that Defendants
12 failed to address in their Motion, Defendants could have removed infringing images at
13 a rate of 247 x 2,160 or **533,520 times faster** than Google processes a typical notice!

14 Defendants likewise fail to submit or address Sample Notice 5. *See* Dkt No.
15 449-16. Sample Notice 5 provided four instances of large files containing multiple
16 messages where Message-IDs were not available but infringing images nevertheless
17 could be downloaded. *See* Declaration of Dr. Norman Zada (Dkt. No. 449-3) (“Zada
18 DMCA Decl.”) ¶ 31, Exh. 14. This notice demonstrates that there is no basis for
19 Defendants’ requirement that a copyright holder must provide Message-IDs, because
20 Message-IDs in many cases cannot be obtained. In fact, Perfect 10 has provided
21 evidence that in as many as 50% of the situations where infringing messages are
22 contained in large files such as .zip files, an error message appears when one attempts
23 to obtain the Message-ID. Perfect 10 has downloaded more than 6,680 Perfect 10
24 images from Defendants’ websites when Message-IDs were not available. Zada Decl.
25 ¶¶ 16-18, Exhs. 1, 7-9.

26 Defendants’ failure to submit or address Sample Notices 1 and 5, as well as 35
27 other Perfect 10 notices they have not provided to the Court, provides a separate and
28 independent basis for this Court to deny the Motion.

IV. DEFENDANTS' SUBMISSION OF ALTERED NOTICES COMPELS THIS COURT TO DENY THE MOTION

In connection with the Motion, Defendants have submitted Exhibit F to the Declaration of Ronald Yokubaitis – a disk that appears to include 388 distinct DMCA notices. A review of Exhibit F establishes that at least 139 of these notices, or 36%, have been altered. Portions of these notices have been cropped off or the notices have been reduced and degraded so that they are impossible to read. In fact, some notices have been altered to the point of being unrecognizable. Zada Decl. ¶ 25, Exh. 11. Moreover, the versions of the notices found in Exhibit F do not have Bates numbers and were not produced in discovery. Zada Decl. ¶ 25, Exh. 11.

V. THE SAMPLE NOTICES DISCUSSED BY DEFENDANTS ALL SATISFY SECTION 512(C)(3)(A)(iii) OF THE DMCA

Although Defendants ask this Court to rule that all of Perfect 10's notices are deficient, their moving papers focus entirely upon five groups of notices (A-E), from which they have selected five sample notices, which we will refer to as Sample Notices A-E. Because Defendants apparently concede that Sample Notice E complies with their DMCA requirements, Perfect 10 will only address Sample Notices A-D. As explained below, although these notices are not representative of the various notices submitted by Perfect 10 to Defendants, each notice complies with Section 512(C)(3)(A)(iii) and thus satisfies the DMCA's notification requirements.

A. "Group A" Consists Of A Single Notice

As far as Perfect 10 is able to determine, there is only one Group A notice – a notice sent by Perfect 10 to Giganews via Federal Express on March 25, 2009, which consisted of full-size images with their File Names and/or Image Identifiers. Defendants' suggestion that this notice did not identify the infringing material or allow such material to be located [*see* Memo at 7:9-11] is simply wrong. The infringing material was the full-size images that were included with the notice, and each had an Image Identifier that allowed the image to be rapidly located. This notice

1 could have been processed at the rate of at least one image every 1.06 seconds, which
2 is extraordinarily fast by DMCA standards and cannot possibly be considered
3 burdensome. Zada Decl. ¶¶ 27-28, Exhs. 13-14. In fact, Perfect 10 sent a similar
4 notice at almost exactly the same time to two other Usenet operators, newsdemon.com
5 and thundernews.com. Both processed the notices they received, whereas Giganews
6 did not. Zada Decl. ¶ 36, Exh. 20.

7 Because Sample Notice A both identified the allegedly infringing images by
8 providing copies of them, and allowed the associated infringing messages to be
9 rapidly located and removed at the rate of about one message per 1.06 seconds, the
10 notice substantially complied with Section 512(c)(3)(A)(iii) of the DMCA.

11 **B. Examples of Compliant Group B Notices**

12 Sample Notice B is unique and is not representative of any of the other notices
13 that Defendants label as “Group B” notices. In fact, Defendants have *left out of their*
14 *Motion* numerous Perfect 10 “Group B” notices, including nine of the 12 Group B
15 notices that they belatedly processed in late 2011, which they still claim are deficient.
16 Zada Decl. ¶ 29. Defendants’ statement that “[t]he [Group B] notices did not state
17 exactly which messages Perfect 10 believed contained infringing material” [Memo at
18 7:27-28] is demonstrably false, and is symptomatic of the false and misleading
19 statements Defendants have made throughout this case. For example, Exhibit 15 to
20 the Zada Declaration was Sample Notice 1 in connection with Perfect 10’s earlier
21 motion before Judge Collins (Dkt No. 142). This notice identified the material
22 claimed to be infringing, and thus satisfied the first part of Section 512(c)(3)(A)(iii),
23 because it included copies of the infringing images. The notice also provided copies
24 of the infringing messages and copies of the authorized images from *Perfect 10*
25 *Magazine*, as well as a search term that led exclusively to content that infringed
26 Perfect 10’s images. That content could have been removed at the rate of 1.3 images
27 per second. Zada Decl. ¶¶ 29-31, Exhs. 1 (Video 2), 15. This is more than 2,800
28 times faster than Google’s typical processing rate and cannot possibly be considered

1 “burdensome” under any reasonable DMCA standard.

2 Contrary to Defendants’ mistaken assertion, Judge Collins did not find that this
3 notice, or any of the other notices submitted by Perfect 10 in connection with its
4 earlier motion, were deficient. Rather, Judge Collins found only that there were
5 triable issues of fact as to whether these notices were DMCA compliant. Given that
6 the existence of the Mimo automatic Message-ID extraction feature was not before
7 Judge Collins, and given Perfect 10’s new evidence that Defendants could have
8 processed the notice 2,800 times faster than Google’s normal processing time, this
9 notice should be found to satisfy Section 512(c)(3)(A)(iii).

10 **C. Sample Notice C Is Altered But Satisfies Section 512(c)(3)(A)(iii)**

11 Sample Notice C is attached to the Declaration of Kathleen Lu in support of the
12 Motion (Dkt No. 534-35) (“Lu Decl.”) as Exhibit 22, pp. 764 -770. As may be seen
13 by a review of the actual notice sent by Perfect 10, found at Exhibit 16 to the Zada
14 Declaration, the version of the notice submitted by Defendants *has been improperly*
15 *altered*. The poster name, Message-ID, and newsgroup have been cropped off on the
16 right side of pages 4-10 of the notice. Moreover, the notice lacks Bates numbers, was
17 never produced in discovery, and should be stricken. Zada Decl. ¶ 32, Exh. 16.

18 The actual notice identified the allegedly infringing material by attaching copies
19 of the both the allegedly infringing images and the infringing messages, and by
20 providing a search term “H99 P10” that led to exclusively infringing material. The
21 notice allowed Giganews to expeditiously locate and remove allegedly infringing
22 material because it could have been processed at the rate of about 1.13 messages per
23 second – approximately 2,440 times faster than Google’s processing rate. Zada Decl.
24 ¶ 32, Exhs. 1 (Video 3), 16. The notice thus clearly satisfies Section 512(c)(3)(A)(iii).

25 Defendants’ claim that Giganews had to “review each image in each notice and
26 manually re-type what appeared to be the Message-ID in the image” [*see* Memo at
27 8:18-20], is another example of a false and misleading statement that Defendants used
28 to mislead Judge Collins. No such manual typing was necessary to process the notice,

1 as demonstrated by the video submitted by Perfect 10. Zada Decl. ¶ 32, Exhs. 1
2 (Video 3), 16.

3 **D. Sample Notice D Is Altered, Improper, and Should be Stricken**

4 Sample Notice D is horribly degraded, was never produced in discovery,
5 and should be stricken. Defendants appear to have reduced the notice by
6 approximately 30% in size and have repeatedly copied the notice to substantially
7 degrade its quality. Zada Decl. ¶ 33, Exh. 17.

8 Defendants' only complaint is that the notice was illegible when it came out of
9 Giganews's fax machine. Memo at 9:23-25. However the notice was not illegible
10 when it was placed into Perfect 10's fax machine. In fact, Defendants have admitted
11 that they were able to process another copy of the notice that was produced in
12 discovery on June 12, 2014, sometime in September 2014. Memo at 10 n.7; Lu Decl.
13 ¶ 27; SUF ¶ 126. Perfect 10 is only responsible for the quality of its notices, not the
14 quality of Defendants' fax machine. Furthermore, the fax machine that Perfect 10
15 used is a business-grade machine that is highly recommended. Perfect 10 has never
16 had an issue with the quality of faxes from that machine have never been an issue
17 before. Zada Decl. ¶ 34, Exh. 18. On the other hand, Defendants have provided no
18 evidence as to the quality of their fax machine, or whether Defendants have *ever*
19 processed a notice sent by fax or by mail.

20 In order to be eligible for a DMCA safe harbor, Defendants must be able to
21 process notices sent by fax, mail, or email. *See CCBill*, 488 F.3d 1102, 1109.
22 Because the quality of Defendants' fax machine makes clear they are incapable of
23 accepting notices by fax, Defendants should be estopped from challenging the
24 sufficiency of any of Perfect 10's faxed notices.

25 Finally, even if Defendants were unable to read any of the Message-IDs in that
26 notice, they were still provided with information sufficient to locate the infringing
27 material as demonstrated in Video 4 found in Exhibit 1 to the Zada Declaration.
28

E. The Fact That Other Usenet Operators Have Processed Perfect 10's Notices Shows That They Comply With Section 512(c)(3)(A)(iii)

Defendants' assertion that Perfect 10's notices are deficient is further belied by the fact that at least four other Usenet operators have processed DMCA notices sent by Perfect 10 that were less detailed than those sent to Defendants. Zada Decl. ¶¶ 36-40, Exhs. 20-24. If those notices included information sufficient to allow those other Usenet operators to locate the allegedly infringing material, then the information in Perfect 10's notices must have been reasonably sufficient to permit Defendants to locate the infringing material as well. Moreover, Defendants themselves have processed 12 of Perfect 10's notices, once again establishing their sufficiency. Zada Decl. ¶ 29. For these reasons as well, the Motion fails.

F. Applicable Case Law Supports The Conclusion That Perfect 10's Notices Comply With The DMCA

The only appellate case to address what constitutes a compliant notice to a Usenet provider under the DMCA supports the conclusion that Perfect 10's notices satisfy the requirements of Section 512(c)(3)(A)(iii). In *ALS Scan, Inc. v. RemarQ Communities, Inc.*, 239 F.3d 619 (4th Cir. 2001), Defendant RemarQ, a Usenet provider, provided its subscribers with access to two newsgroups which contained Plaintiff ALS Scan's name in the title and contained hundreds of postings that infringed ALS Scan's copyrighted images: "alt.binaries.pictures.erotica.als" and "alt.als." *Id.* at 620. ALS Scan sent RemarQ a letter advising RemarQ that these newsgroups were created for the sole purpose of violating ALS Scan's copyrights and demanding that RemarQ cease carrying these newsgroups. RemarQ refused to take any action, but advised ALS Scan that RemarQ would remove individual infringing items if ALS Scan identified them with "sufficient specificity." *Id.* at 620-21.

After ALS Scan sued, RemarQ asserted that ALS Scan failed to comply with the DMCA's notice requirements because "ALS Scan never provided it with a 'representative list' of the infringing photographs, as required by § 512(c)(3)(A)(ii),

1 nor did it identify those photographs with sufficient detail to enable RemarQ to locate
2 and disable them, as required by § 512(c)(3)(A)(iii).” *Id.* at 624. RemarQ buttressed
3 its assertion “with the observation that not all materials at the offending sites
4 contained material to which ALS Scan held the copyrights.” *Id.* at 624.

5 In rejecting RemarQ’s position, and holding that ALS Scan’s letter
6 “substantially complied with the notification requirement” of providing “information
7 reasonably sufficient to enable RemarQ to locate the infringing material” [*id.* at 625],
8 the Fourth Circuit described the requirements of Section 512(c)(3)(A)(iii) as follows:

9 [W]ith respect to location information, the copyright holder must provide
10 information that is “*reasonably sufficient*” to permit the service provider
11 to “locate” this material. *Id.* § 512(c)(3)(A)(iii) (emphasis added). This
12 subsection specifying the requirements of a notification ***does not seek to***
13 ***burden copyright holders with the responsibility of identifying every***
14 ***infringing work – or even most of them*** – when multiple copyrights are
15 involved. Instead, the requirements are written so as to ***reduce the***
16 ***burden of holders of multiple copyrights who face extensive***
17 ***infringement of their works***. Thus, when a letter provides notice
18 equivalent to a list of representative works that can be easily identified by
19 the service provider, the notice substantially complies with the
20 notification requirements.

21 *Id.* at 624 (emphasis in italics in original; emphasis in bold added). Thus, under *ALS*
22 *Scan*, it was sufficient for Plaintiff ALS Scan to identify a collection of messages, the
23 vast preponderance of which infringed its copyrights. It was not necessary for ALS
24 Scan to identify each specific infringing message, let alone the Message-ID for each
25 such message.

26 Perfect 10’s notices are demonstrably more detailed and complete than the
27 notice found compliant in *ALS Scan*. Instead of merely pointing to a particular
28 newsgroup, and stating that *almost all* of the images in that newsgroup are infringing,

1 as plaintiff did in *ALS Scan*, Perfect 10 provided Defendants with a recommended
2 search that resulted in 100% infringing Perfect 10 images. Zada Decl. ¶ 24, Exh. 1
3 (Video 5). Furthermore, Perfect 10 provided copies of a representative sample of the
4 infringed images, rather than just pointing Defendants to its website, as plaintiff did in
5 *ALS Scan*. Application of *ALS Scan* thus compels the conclusion that Perfect 10's
6 notices substantially satisfy Section 512(c)(3)(A)(iii), regardless of whether they
7 include Message-IDs. *See also Arista Records, Inc. v. MP3Board, Inc.*, 2002 WL
8 1997918, at * 9 (S.D.N.Y., August 29, 2002) (record company's letter naming
9 particular artists and songs, with screen shots of defendant's website, without URLs,
10 was sufficient to locate the links of the infringing materials); Zada Decl. ¶48, Exh. 31.

11 **VI. DEFENDANTS' INCORRECT ASSERTIONS PROVIDE NO BASIS TO**
12 **RULE THAT PERFECT 10'S NOTICES DEFICIENT**

13 Defendants raise various mistaken and misleading contentions in an attempt to
14 show that Perfect 10's notices are deficient. As explained below, this Court should
15 reject all of these assertions.

16 **A. There Is No Required Format For A DMCA Notice**

17 Defendants first contend that Perfect 10's notices are deficient because they fail
18 to include Message-IDs. Memo at 19:26-28. This assertion is contrary to law. The
19 issue before this Court is whether Perfect 10's notices substantially satisfy Section
20 512(c)(3)(A)(iii), not whether Perfect 10 should have included Message-IDs in its
21 notices. "Section 512(c)(3) does not require any particular format for DMCA
22 notices." *Perfect 10, Inc. v. Yandex, N.V.*, 2013 WL 1899851, at *5 ("*Yandex*").
23 Thus, the fact that many Perfect 10's notices contained Message Descriptions, rather
24 than Message-IDs, does not invalidate these notices. *See* Section VII, below. In fact,
25 the Perfect 10 notice that the *Yandex* court found to comply with the DMCA attached
26 copies of infringing images and authorized images, much in the same fashion as the
27 notices sent by Perfect 10 to Defendants at issue here. Zada Decl. ¶ 41, Exh. 25.

B. Perfect 10's Notices Are Written Documents

Defendants also mistakenly contend that Perfect 10's written notices do not constitute a "written communication under Section 512(c)(3). Memo at 16:11-13. This assertion is unsupportable and incorrect, and no Court has ever made such a finding. On the contrary, the Perfect 10 notice found compliant in *Yandex* had very similar written language. See *Yandex*, 2013 WL 1899851, at *5.

C. Perfect 10's Notices Identified The Material That Is Claimed To Be Infringing

Defendants incorrectly assert that Perfect 10 failed to satisfy the first prong of Section 512(c)(3)(A)(iii) because its notices did not identify the allegedly infringing material. As demonstrated in Section V above, Perfect 10's notices satisfied this requirement in multiple ways. These notices attached copies of the allegedly infringing images with their Image Identifiers in thumbnail format and generally provided all or a representative sample of the allegedly infringing messages as well. Moreover, many notices also provided a search term which identified all of the infringing messages. Defendants have not shown, and cannot show, that such information fails to comply with the first prong of Section 512(c)(3)(A)(iii).

D. Perfect 10's Notices Also Provided Information Sufficient To Locate The Allegedly Infringing Material

Perfect 10's notices also satisfied the second prong of Section 512(c)(3)(A)(iii), because they provided information sufficient for Defendants to locate the allegedly infringing material by including one or more of the following: (i) Image Identifiers for each allegedly infringing image, which Defendants could have used to remove blocks of images at a time [Zada Decl. ¶¶ 27-28, Exhs. 13-14]; (ii) copies of the actual infringing messages [Zada Decl. ¶¶ 31-32, Exhs. 15-16]; and (iii) search terms which allowed hundreds of infringing messages to be located and removed, typically in seconds. Zada Decl. ¶¶ 32-33, Exhs. 16-17.

E. Defendants' Claims Of "Burden" Are Imaginary

Defendants assert that they it would be extremely burdensome for them to process Perfect 10's notices. Memo at 16:23-17:16. Defendants are wrong. As explained above, Sample Notices A, B, and C are substantially less burdensome to process than the average DMCA notice, because these notices all could have been processed at least 2,000 times faster than Google's average processing rate. Zada Decl. ¶¶ 27-28, 31-33, Exhs. 1, 13-17; Declaration of Professor J. Douglas Tygar, submitted herewith ("Tygar Decl.") ¶¶ 13-21. In addition, a review of Defendants' alleged list of "burdens" shows that the steps they describe are nothing more than would be required to process any DMCA notice:

Burden No. 1: Reading the notice. DMCA agents are supposed to read DMCA notices they receive. Failure to read DMCA notices constitutes willful blindness. If Defendants read the hundreds of thousands of DMCA notices they have received, they would realize that virtually everything on their servers infringes copyright.

Burden Nos. 2 and 3: Acquiring the newsreader and selecting the newsgroup. DMCA agents are supposed to set up a department to process DMCA notices and provide the department with whatever it needs to do so. Purchasing Newsrover costs \$30 and setting it up takes ten minutes. Zada Decl. ¶ 9. Defendants already have the Mimo newsreader. Moving from one newsgroup to another using Mimo takes at most six seconds. Zada Decl. ¶ 35, Exh. 19. Defendants are making billions from infringement. Under these circumstances, the assertion that spending \$30 and ten minutes to set up a newsreader constitutes a burden is laughable.

Burden No. 4: Typing in the search and pressing the enter button. This task takes a few seconds at most. Zada Decl. ¶ 24, Exh. 1, Video 5.

Burden Nos. 5 and 6: Burden 5 is non-existent for Perfect 10's notices that ask Defendants to conduct a search and remove all resulting messages. Once the search is performed, Defendants could simply employ the Mimo or Newsrover automatic Message-ID/Message Header extraction feature to remove all the resulting messages

1 in seconds. Zada Decl. ¶ 24, Exh. 1, Video 5.

2 Defendants' contention that search results may change for searches
3 recommended by Perfect 10, or that Defendants need to do any comparison or
4 counting of search results [Memo at 17:8-14], is misplaced. In most instances, when
5 the search recommended by Perfect 10 is performed, the result will be no more than a
6 few .zip files, all of which contain exclusively Perfect 10 content. Zada Decl. ¶ 17,
7 Exh. 8. Defendants provide no evidence to the contrary. Furthermore, Sections
8 512(f) and (g) of the DMCA protect Defendants from any liability for removing non-
9 Perfect 10 content as a result of an over-inclusive Perfect 10 notice, should that ever
10 occur. As one treatise has noted, Sections 512(f) and (g) of the DMCA "provide[]
11 sufficient disincentives and correctives for overbroad notification to obviate any need
12 for hypertechnical interpretation of the requirement for identifying works allegedly
13 infringed." J. Dratle and S. McJohn, *Cyberlaw-Intellectual Property in the Digital*
14 *Millennium* (Law Journal Press 2010) at 6-88.7.

15 Defendants currently have no person who regularly reviews DMCA notices. If
16 Defendants can spend the time and money to create an elaborate computerized system
17 to automatically process millions of DMCA notices, they certainly can spend a few
18 minutes to purchase a subscription to the Newsrover newsreader and load it with the
19 three newsgroups needed to process the vast preponderance of Perfect 10 notices.
20 Zada Decl. ¶ 9.

21 **F. Case Law Does Not Support A Message-ID Requirement**

22 In support of their Motion, Defendants rely almost exclusively on the Ninth
23 Circuit's ruling in *CCBill*. *CCBill* provides no basis for this Court to grant the
24 Motion. The case merely stands for the proposition that it is the copyright holder's
25 burden to provide information to **locate** the infringing material, a requirement that
26 simply tracks the language of the statute. *CCBill*, 488 F.3d at 1113. The statutory
27 requirement set forth in Section 512(c)(3)(A)(iii) is information reasonably sufficient
28 to **locate** the allegedly infringing material, not information sufficient to **remove** that

1 material. Defendants have not shown, and cannot show, that it is unreasonably
2 burdensome for them to locate the allegedly infringing material identified in Perfect
3 10's notices. Instead, they attempt to mislead the Court by confusing the issue of
4 **removing** content with the issue of **locating** content.

5 Perfect 10's notices, however, provide information sufficient both to locate and
6 remove allegedly infringing material. Because the Message-ID extraction process is
7 almost instantaneous, a Perfect 10 notice that asks Defendants to perform a search and
8 remove all resulting messages both locates the material and allows Defendants to
9 remove the material in seconds. Such a notice simply is not burdensome to process.

10 *CCBill* is of no help to Defendants for an additional reason. The DMCA notice
11 at issue in *CCBill* was not a single document. Instead, the notice consisted of more
12 than 22,185 pages of three different sets of documents, sent in eight bankers' boxes as
13 many as eight months apart. Zada Decl. ¶ 47, Exh. 30. Because the notice was not a
14 single document, it was unduly burdensome to use to locate the infringing material.
15 *CCBill*, 488 F.3d at 1112-1113. Moreover, the notice failed to satisfy Sections
16 512(c)(3)(A)(v) and (vi) because it lacked the necessary swearing language. Zada
17 Decl. ¶ 47, Exh. 30. Neither Sample Notices A-D nor any of Perfect 10's notices has
18 any of those deficiencies. Rather, each Perfect 10 notice is a single, self-contained
19 document. Accordingly, *CCBill* provides no support for Defendants' position.

20 **VII. MESSAGE DESCRIPTIONS ARE MUCH MORE EFFICIENT THAN** 21 **MESSAGE-IDS IN LOCATING INFRINGING MESSAGES**

22 A Message Description is the line of text that appears in each line of a
23 newsreader. An example of a Message-Description is "Don Chu Luvitt > Your P10
24 2007 (which is the Message-Title), followed by "24 Jan 2009 06:41 PM" (the date of
25 the post) followed by "224 MB" (the size of the file posted), followed by
26 BillC@myplace.com (BillC). Zada Decl. Exh. 8, p 11. Perfect 10 provided Message
27 Descriptions, rather than Message- IDs, in many of its DMCA notices. Zada Decl. ¶¶
28 31-32, Exhs. 15-16. As discussed below, the multiple advantages of Message

1 Descriptions over Message-IDs further demonstrates that compliant DMCA notices
2 need not include Message-IDs, and provides yet another reason to deny the Motion.

3 **A. There May Be Thousands Of Message-IDs For One Message**
4 **Description**

5 A single Message Description of a movie, such as “X-Men Origins” may be
6 associated with as many as 63,632 Message-IDs. Zada Decl. ¶ 14, Exh. 5.
7 Defendants have not explained, and cannot explain, why it is more efficient to provide
8 63,632 Message-IDs in a DMCA notice, rather than simply providing a one-line
9 Message Description.

10 Moreover, Defendants’ suggestion that a Message Description does not
11 uniquely identify the allegedly infringing message is simply wrong. Tygar Decl. ¶ 15.
12 Defendants have never provided, and cannot provide, an example of two different
13 messages with the same Message Description. Even if such a rare occurrence ever
14 arose, Defendants simply could check the content in both messages and remove both
15 messages if the material in both messages was infringing.

16 **B. Message Descriptions Describe The Infringing Content And May Be**
17 **Searched On, Message-IDs Do Neither**

18 Perfect 10 identified the infringing material in its notices by including the
19 infringing Perfect 10 image, together with its Image Identifier that is part of the
20 infringing message. An example of an Image Identifier is Masha Vasileva 2.jpg. The
21 Image Identifier describes the infringing material to a lay person, because it is part of
22 the Message Title. Moreover, the Image Identifier may be searched on by a lay
23 person to find the associated infringing message. In contrast, the Message-ID is not
24 the infringing material and may not be searched by a lay person to find the associated
25 message. Zada Decl. ¶¶ 11-13, Exhs. 1, 4; Tygar Decl. ¶ 35.

26 **C. The Closest Analog To A URL Is The Message Description, Not The**
27 **Message-ID**

28 Defendants mistakenly assert that Message-IDs are analogous to URLs on the

1 World Wide Web. Memo at 4:2-4. That is simply not the case. Because Message-
2 IDs cannot be searched on by lay persons, they cannot be used by third-parties to
3 locate the associated message. Philip Molter, Giganews's Chief Technical Officer has
4 conceded that point. Davis Decl. Exh. 1 (Molter Depo.) 151:3-152:5; Zada Decl. ¶¶
5 11-13, Exhs. 1, 4. The analog of a URL in the context of the Usenet, if there is one, is
6 the Message Description. The Message Description may be searched on by anyone to
7 locate the associated message, and in fact, effectively is the associated message.
8 Furthermore, although one generally may use the Message Description to find the
9 associated Message-ID(s), one cannot use Message-IDs to locate the associated
10 Message Description. Zada Decl. ¶¶ 11-13, Exhs. 1, 4.

11 **D. Message-IDs Often Do Not Exist**

12 Message-IDs frequently do not exist. In fact, Perfect 10 recently has discovered
13 more than 500 .zip or .rar files containing more than 6,680 infringing Perfect 10
14 images for which Message-IDs do not exist, including a Group B notice that
15 Defendants have omitted from their Motion. Zada Decl. ¶¶ 16-18, 30, Exhs. 7-9;
16 Tygar Decl. ¶¶ 31-32; See also ¶¶ 22-30. This critical fact was not before Judge
17 Collins when she ruled on Perfect 10's earlier motion for partial summary judgment
18 (Dkt. 180). By contrast, there cannot be a message without a Message Description.
19 Defendants' requirement that compliant DMCA notices include Message-IDs cannot
20 possibly be upheld when Message-IDs frequently do not exist.

21 For example, although Defendants claim that Perfect 10 should have provided
22 Message-IDs for the 1468 infringing images identified by Sample Notice A,
23 *Defendants have provided no evidence that such Message-IDs were available for any*
24 *of those images* back in 2009 when the notice was created.⁴ Under the circumstances,
25 Giganews should be estopped from claiming that the notice is deficient because
26

27 ⁴ The messages shown in page 5 of Exhibit 13 to the Zada Declaration were posted
28 after Sample Notice A (Perfect 10's March 25, 2009 notice) was created.

1 Message-IDs were not provided.

2 **E. Even When Message-IDs Exist, It Is Frequently Not Possible To**
3 **Determine The Correct Message-ID**

4 Whenever Perfect 10's images are intermixed with third party images in a .zip
5 file, it is typically not possible for Perfect 10 to determine which Message-IDs are
6 associated with its images. Zada Decl. ¶ 19, Exh. 10. In these situations, Perfect 10
7 had no choice but to provide the infringing Message Descriptions with copies of the
8 infringing images and their Image Identifiers.

9 **F. Lists Of Message-IDs Are Prone To Human And Computer Error**

10 Message-IDs are extraordinarily prone to both human and computer error. This
11 fact was also not before Judge Collins. The i's and l's and 1's in Message-IDs are
12 very frequently misread by computers (as well as O's and 0's and other similar
13 characters), rendering the Message-ID useless. Giganews has produced to Perfect 10
14 in discovery 2,494,344 Message-IDs in machine readable text that Perfect 10 has
15 examined. Of those, approximately, 44.7%, or 1,115,040 Message-IDs, had obvious
16 errors. Zada Decl. ¶ 20. These extremely high numbers strongly suggest that
17 Message-IDs are completely unusable. Zada Decl. ¶ 20.

18 Message Titles are much less prone to errors because they typically contain
19 terms such as "perfecttengallery" that can be understood. If there is an error in a
20 Message-Title, it can be readily spotted. However, errors in Message-IDs typically
21 cannot be spotted because Message-IDs are incomprehensible.

22 **VIII. DEFENDANTS HAVE NO BASIS TO REQUIRE LISTS OF MESSAGE-**
23 **IDS AS DMCA NOTICES**

24 In addition to the reasons discussed in Section VII, above, there are additional
25 bases for this Court to reject Defendants requirement that DMCA notices include
26 Message-IDs.

A. List Of Message IDs Do Not Comply With The Requirements of the DMCA

A Message-ID, standing alone, such as beidnZ1rdsfZ-kTVnZ2dnUV, is not understandable and does not identify the infringed copyrighted work. It is reasonable to assume that when Congress used the terms “identify” and “locate” in Section 512(c)(3)(A), it meant “identify” for the purposes of a lay person, such as a juror. Jurors and judges cannot look at a list of Message-IDs and determine anything. Stated another way, a notice that is incomprehensible to a lay person cannot satisfy Section 512(c)(3)(A)(ii), which requires an identification of the copyrighted works allegedly infringed, or Section 512(c)(3)(A)(iii), which requires identification of the material claimed to be infringing. Giganews’s DMCA agent and its co-CEO Ronald Yokubaitis has described a list of Message-IDs as “gibberish.” Davis Decl. ¶ 4, Exh. 3 (R. Yokubaitis Depo.) 141:23-144:20. Copyright holders cannot be required to create notices they cannot understand, when one of the requirements of a compliant DMCA notice is a statement, under penalty of perjury, that the notice is accurate. *See* 17 U.S.C. § 512(c)(3)(A)(vi).

Moreover, the Honorable A. Howard Matz first presided over this case when it was first transferred to the Central District of California. In *Perfect 10, Inc. v. Google, Inc.*, Case No. 04-9484 AHM in the United States District Court for the Central District of California, Judge Matz ruled on July 26, 2010 that certain notices sent by Perfect 10 were deficient because they failed to provide “the URL on the P10 website or the volume and page number of *Perfect 10* magazine at which the original copyrighted image appears.” Zada Decl. ¶¶ 50-51, Exhs. 32, 33, n. 7. As a result, Judge Matz would have found lists of Message-IDs as required by Defendants deficient under the DMCA.

Defendants previously have asserted that compliant DMCA notices must provide lists of copyright registration numbers. *See* Defendants Motion to Dismiss (Dkt No. 11-1), 5:20-22, 10:25-27. Furthermore, Defendants have conceded that

1 notices that merely provide lists of Message-IDs, as required by Defendants, do not
2 comply with the DMCA or with Judge Matz's ruling in *Google*. Zada Decl. ¶¶19, 50-
3 51, Exhs. 10, 32-33.

4 Defendants cannot have it both ways. If some sort of identification of the
5 copyrighted work is required, as Defendants concede, then the lists of Message-IDs
6 required by Defendants do not comply with the DMCA. For this reason as well, this
7 Court should not uphold Defendants' Message-ID requirement.⁵

8 **B. Defendants Do Not Explain How To Find Message-IDs**

9 Defendants' DMCA instructions do not explain how to find Message-IDs, let
10 alone find them expeditiously. There is no mention in Defendants' DMCA
11 instructions of the Mimo automatic Message-ID extraction feature. Zada Decl. ¶ 15,
12 Exh. 6. Defendants' DMCA agent, Ronald Yokubaitis, did not even know how to
13 find Message-IDs. Davis Decl. ¶ 4, Exh. 3, (R. Yokubaitis Depo.) 91:12-24, 94:9-13,
14 194:22-195:9. Copyright holders typically download content without ever
15 encountering Message-IDs. Zada Decl. ¶ 11, Exh. 1 (Videos 1 and 6). Under the
16 circumstances, Defendants cannot reasonably insist that copyright holders provide
17 Message-IDs in their DMCA notices; the average copyright holder cannot be expected
18 to find Message-IDs, let alone know how to rapidly extract them.

19 **C. Message-IDs Are Extremely Burdensome To Cut And Paste By**
20 **Hand**

21 Message-IDs are extremely burdensome to cut and paste by hand. It would
22 have taken Perfect 10 months to cut and paste the tens of thousands of Message-IDs
23 corresponding to approximately 61,000 copies of Perfect 10 images infringed by
24 Defendants. Zada Decl. ¶ 15, Exh. 6. Furthermore, because Defendants do not issue
25 cancel commands (requests that other Usenet providers remove the same infringing

26 ⁵ To the extent that Defendants contend that Perfect 10 should have matched each
27 image to its associated Message-ID, such a task is impossible to carry out because the
28 Message-IDs are incomprehensible.

1 message), Perfect 10 would have had to create a separate set of DMCA notices for
2 each of potentially hundreds of different Usenet operators to remove all of the
3 infringing Perfect 10 images found on the Usenet. Zada Decl. ¶ 21.

4 **D. To The Extent That Message-IDs Are Needed, To Avoid Error,**
5 **Defendants Need To Extract Them**

6 Defendants cannot reasonably suggest that Perfect 10 should have extracted
7 Message-IDs itself, for multiple reasons. First, Perfect 10 was not aware of the Mimo
8 automatic Message-ID extraction feature while it was creating and sending the
9 hundreds of DMCA notices it submitted to Defendants. Defendants failed to notify
10 Perfect 10 (or any other copyright holders) of such a feature. Zada Decl. ¶¶ 15, 23,
11 Exh. 6. Because the extraction of thousands of Message-IDs by hand would take
12 months, Defendants cannot possibly claim that Perfect 10 should have performed such
13 a burdensome task, when Defendants knew how to perform this extraction in seconds.

14 Furthermore, there is no reason for Defendants to insist that copyright holders
15 extract the Message-IDs themselves. Because Message-IDs are prone to error,
16 requiring copyright holders to extract and send these Message-IDs to Defendants
17 would only lead to those Message-IDs being misread by Defendants' automated
18 system, thereby causing massive errors. Zada Decl. ¶ 20. To eliminate the possibility
19 of such errors, Defendants should do the automatic Message-ID extraction themselves.
20 The few extra seconds it would take to perform this task cannot possibly be
21 considered unduly burdensome.

22 **IX. GIGANEWS RELIES ON WITNESSES WHOSE CREDIBILITY IS AT**
23 **ISSUE**

24 Defendants' Motion should be denied for the additional reason that it relies
25 almost exclusively on declarations of witnesses whose credibility is at issue.
26 Giganews's four employee witnesses, Ron Yokubaitis, Philip Molter, Jonah
27 Yokubaitis, and Shane Menking, answered "I don't know" or the equivalent, 1,426
28 times in five days of depositions. Davis Decl. ¶ 7. In his current declaration, Mr.

1 Yokubaitis has “authenticated” at least 139 altered Perfect DMCA notices. Even
2 though they have made multiple critical statements of Perfect 10’s notices, **none** of
3 Defendants’ witnesses review DMCA notices or are involved in the processing of
4 DMCA notices. Davis Decl. Exh. 1 (Molter Depo.), 38:2-3. Neither Mr. Molter nor
5 Mr. Yokubaitis ever performed any of Perfect 10’s recommended searches or
6 otherwise attempted to process any of Perfect 10’s DMCA notices. *Id.* Exh. 1,
7 (Molter Depo.) 126:23-127:10. Mr. Yokubaitis testified he has never looked at
8 Giganews’s DMCA log as he lacks the technical expertise to do so. Nor did Mr.
9 Yokubaitis even know how to find a Message-ID. *Id.* Exh. 3 (R. Yokubaitis Depo.)
10 91:12-24, 94:9-13, 194:22-195:9. Both Ronald Yokubaitis and Philip Molter
11 suppressed the existence of the Mimo automatic Message-ID extraction feature.
12 Neither has any personal knowledge to support the statements made in their
13 declarations.

14 Giganews’s purported expert, William Rosenblatt, submitted a declaration on
15 November 25, 2013 (Dkt. 149-2) before Judge Collins (“Rosenblatt Decl.”), which
16 criticized Dr. Zada and Perfect 10’s notices. He also contended that it would be
17 “trivial” for Perfect 10 to create a computer program to automatically generate DMCA
18 notices. Rosenblatt Decl. ¶¶ 46-47, 79-81. However, during his August 22, 2014
19 deposition (“Rosenblatt Depo.”), Mr. Rosenblatt testified that he did not know how to
20 write such a program, and that he was not a competent programmer. Davis Decl. ¶ 8,
21 Exh. 7 (Rosenblatt Depo.) 231:3-233:18.

22 **IX. CONCLUSION**

23 For all of the foregoing reasons, Perfect 10 respectfully requests that this Court
24 deny Defendants’ Motion in full.

25 Dated: October 20, 2014

Respectfully submitted,

26 By: 
27 _____

Lynell D. Davis, Esq.

Attorney for Plaintiff Perfect 10, Inc.